***** NOT FOR PUBLICATION *****

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

In re:	)	
	)	
PATRICK MICHAEL McNALLY,	)	Bankruptcy Case No. 06-10073-HRT
SSN: XXX-XX-0055	)	Chapter 13
	)	
Debtor.	)	
	)	
DENISE MELANIE McGLOTHLIN,	)	Bankruptcy Case No. 06-10196-HRT
SSN: XXX-XX-7955	)	Chapter 13
	)	
Debtor.	)	
	)	
DIANNA DENISE BROWN,	)	Bankruptcy Case No. 06-10280-HRT
SSN: XXX-XX-0244	)	Chapter 13
	)	
Debtor.	)	

ORDER ALLOWING COMPENSATION FOR DEBTORS' COUNSEL

THIS MATTER comes before the Court on the requests by Debtors' attorney for payment of fees in these three cases. The Standing Chapter 13 Trustee has filed objections in each case. The Court held hearings on July 6 and 13, 2006, has reviewed its files, the evidence and arguments presented by the parties and is ready to rule. The Court is advised that these hearings were somewhat of a "set-up" by the parties to bring some long-pending differences of opinion over certain issues to a head and seek judicial guidance. The old caution of "be careful what you ask for" may come to mind.

FACTUAL OVERVIEW

The facts of these three cases are fairly similar. Although the parties did not spend much hearing time on this area, the Court has gleaned sufficient, additional factual information as needed from the record and the Docket Sheet for each case.

In summary, each of these Chapter 13 cases were filed in January, 2006. In addition to the Voluntary Petitions and creditor matrices, a portion of the new documents now required by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), were filed. These documents include such items as credit counseling certificates; pay advices or explanations about them; and Statements of Current Monthly Income. The Court issued Notices of Deficiencies for any missing documents, including Schedules and Statement of Affairs if applicable. These deficiencies were cured. The initial Chapter 13 Plans in each of these cases were filed with the Petition; and so the Court's setting and noticing of the confirmation hearings were not delayed.

The Chapter 13 Trustee was the only party to object to plan confirmation in each of the three cases. In response to the objection, each of these debtors filed an Amended Chapter 13 Plan and any related Amended Schedules or Statements to support those plans. Thereafter, the Chapter 13 Trustee either withdrew her objection to plan confirmation or allowed the notice period for the Amended Plan to expire without filing further objections.

The Court confirmed the Plans. In McNally, the period from case filing until entry of the Chapter 13 Plan Confirmation Order was about 91 days; in McGlothlin, 90 days; and in Brown, 77 days. Following plan confirmation, Debtors' counsel filed Fee Applications and the Chapter 13 Trustee objected.

ISSUE

The primary question before the Court is "did the Debtors' attorney request reasonable compensation for actual and necessary services provided to each Debtor in these Chapter 13 cases?" Following a discussion of the issues presented by these three cases, the Court will determine a reasonable fee for each case.

DISCUSSION

Analytical Overview

The Tenth Circuit has adopted the lodestar analysis set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-20 (5th Cir. 1974) through its decision in *Matter of Permian Anchor Services*, 649 F.2d 763 (10th Cir. 1981). These cases, and a legion of others, provide that the twelve (12) following factors are to be considered when determining what amounts are reasonable compensation for the time spent on billable tasks or activities:

1) The time and labor required
2) The novelty and difficulty of the questions
3) The skill requisite to perform the legal service properly
4) The preclusion of other employment by the attorney due to acceptance of the case
5) The customary fee
6) Whether the fee is fixed or contingent
7) Time limitations imposed by the client or circumstances

8) The amount involved and the results obtained
9) The experience, reputation, and ability of the attorneys
10) The "undesirability" of the case
11) The nature and length of the professional relationship with the client
12) Awards in similar cases

Several key factors from the above list have been codified in §330(a) as well. The burden of proof on all of these issues is on the fee applicant.

In addition, the Court notes that the Bankruptcy Code was intended to overrule the principle of economy so that bankruptcy attorneys might be paid rates commensurate with those charged in non-bankruptcy areas of law. Thus, the current approach represents a more market-driven focus. It does not appear that BAPCPA intended to somehow return to the principal of economy.

Since these are Chapter 13 cases, the Court also finds that the case of *In re Ingersoll*, 238 B.R. 202, 203 (D.Colo. 1999) is quite relevant to the issues presented. That case involved consolidated bankruptcy appeals by debtor's attorney concerning the fairness of the procedure previously followed by bankruptcy judges in Colorado in determining the reasonableness of fees charged by Chapter 13 attorneys.

On appeal, District Court Judge Matsch determined that the "standardized" "check the box" orders and the failure to conduct evidentiary hearings by the Bankruptcy Court were flawed and inconsistent with procedural due process. *Id*. The issues to be resolved in the fee application disputes were factual questions, and "boilerplate objections" by the Bankruptcy Court were not sufficiently specific to give attorneys notice of what showing is adequate for future fee applications. *Id* at 204. Judge Matsch went on to note that it would be more appropriate for the Chapter 13 trustee to make objections to fee applications so an adversary relationship would not develop between Chapter 13 debtor's counsel and the judiciary. *Id* at 209.

The guidance *Ingersoll* provided eventually resulted in the Court's current use of a Presumptively Reasonable Fee process that allows Debtor's counsel, the Chapter 13 Trustee, other objectors, and the Court to more efficiently and effectively carry out their respective duties, responsibilities and authorities under the Bankruptcy Code. In this Court's view, Judge Matsch's guidance and remarks in *Ingersoll* remain applicable and bear repeating.

Judge Matsch disagreed with the Bankruptcy Court's general view of the Chapter 13 practice and the awarding of fees. "The factual premises underlying the objections raised *sua sponte* by the judicial officers of the Bankruptcy Court appear to be based upon problematic presumptions about the practice of law in this area." *Id* at 207. Judge Matsch chided the Bankruptcy Court for erroneously assuming that 1) there is "a single model of organizational efficiency in a bankruptcy lawyer's office" and 2) that all "lawyers who file Chapter 13 petitions have a sufficient volume of debtor-clients to support employment of paralegals and clerical assistants trained to perform these tasks in minimum times." *Id*. Further, Judge Matsch noted that Chapter 13 attorney's clients are not merely "customers" and the debtors are often not

very knowledgeable about their own affairs and poor record keepers. *Id* at 208. A bankruptcy lawyer must counsel each client as an individual, and "must not be shunted aside for the sake of efficiency and false economy." *Id*.

In often quoted terms, Judge Matsch stated that "The Bankruptcy Court is not the bargain basement of the Federal court system." *Id*. While Judge Matsch acknowledged, "Michelangelo should not charge Sistine Chapel rates for painting a farmer's barn," he also noted that even the Standing Chapter 13 Trustee was appreciative of the services counsel provided to the debtors. *Id*.

For this Court, *Ingersoll* suggests Chapter 13 attorneys have a difficult job and deserve just compensation. Chapter 13 debtor's attorneys often deal with difficult clients, who consume more of the attorney's time, or their staff, than a cursory examination of the case might lead one to believe. BAPCPA has not made the job any easier.

To set fees, the Court returns to the fact that it must set a reasonable fee for the services performed under the circumstances of each case. Other courts have stated that both the billing and fee review process are more art than science. The Court is not required to, nor realistically could it, determine an exact or a perfectly, precise fee for each case. The Court's charge is to set a reasonable fee.

For this Court, that fee review and allowance process is a holistic one. It involves, on one level, looking at the big picture of a case. What were the results obtained? What were the problems encountered? What expertise did counsel bring to the case? Was the rate charged for the services within the legal community norms? And, was the engagement completed in a timely, efficient manner under the circumstances?

On another level, the process also involves looking at the specific tasks performed and the manner in which they were handled. Were the services performed adequately described? Were given tasks necessary? Was the time spent on them reasonable? Did the tasks provide value by advancing the current issue or the case as a whole? How complex were the tasks? Who did them?

It can be a daunting task to review and analyze these several and independent standards all for the purpose of fixing a reasonable fee. That is probably why many judges often state that determining fees is one of the most difficult and challenging responsibilities they have.

Determining a reasonable fee involves consideration of all the *Johnson* factors, not just those which the fee objector believes the fee applicant has violated. To just dwell on the offending tasks or services distorts the reality of the case. It may result in a mechanical, "cookie-cutter" approach, making it an incomplete review process. Such process becomes one of going through the time records, culling out those entries that offend any of the recognized fee standards, and reducing the total fee by some amount for each alleged billing infraction. Such a narrowly-focused analysis results in a "nit-picking" exercise that may actually impede the process of determining a reasonable fee, since it tends to push the big picture factors into the background or eliminate them entirely. Such focus may also tend to exert an inordinate,

downward pressure on fees in general, regardless of individual case circumstances and unwittingly foster the bargain basement type of pricing structure that *Ingersoll* cautioned against.

Fee Analysis for These Three Cases

Returning to the three cases before the Court, in argument, the Trustee asserted that the *Johnson* factors that apply to these cases are 1) the time and labor required; and 3) the skill required. The Trustee believed that certain *Johnson* factors did not apply to these cases, such as 4) the preclusion of other employment; 6) whether the fee is fixed or contingent; 10) the undesirability of the case; and 11) the nature and length of the professional relationship.

The Court believes the Trustee's position is too narrow for the purposes of setting fees in these cases. The Court notes that these four factors and others generally exist as underlying considerations for most Chapter 13 fee applications.

For example, as to the fixed or contingent fee, factor 6), Colorado permits attorneys to "unbundle" legal services. This allows a wide range of fee arrangements and implicates that factor in most cases. Under our current Presumptively Reasonable Fee process, attorneys may agree to take a case on a "flat" or fixed-fee basis if they believe the case can be done for an amount at or below the Presumptive Fee level. Or, they may decide to perform services based on an hourly rate and keep time records if they believe the case will exceed the Presumptive Fee. Each has its risks.

The flat fee may eliminate the need to keep detailed time records; but, if an objection is made to the fees requested, even if the fee is at or under the Presumptive level, the attorney may be hard pressed to carry the burden of proof without detailed, contemporaneous time records. But, if the case does not draw objection, the exercise of record-keeping may be unproductive. On the other hand, the detailed records may provide just the ammunition a party needs to craft an objection to the fees sought. It's a conundrum, but the burden to support the fee request still remains.

In this Court's view, an attorney gets points for a reasonable, good faith attempt to keep as detailed time records as possible given the often short duration of the tasks performed and the frequent time-pressure created by the volume of cases being handled within the office. Here, Debtors' counsel kept such records.

Factor 11), the nature and length of the professional relationship, also has a bearing in every case. Frequently, the Chapter 13 debtor and its counsel began their relationship only a short time before the case needed to be filed. Emergency case filings using the best available skeletal information are not uncommon. Even the most routine case filing situations have the potential of blowing up into a crisis. The Trustee and creditors may have questions or seek information which the uninitiated or unsophisticated client simply does not have, did not keep, or has difficulty getting. Such situations may not preclude other employment, but surely tend to negatively affect the desirability of the case. Again, this is a factor the Court believes should weigh somewhat in favor of Debtors' counsel.

And, finally, as to the other *Johnson* factors, the Trustee submitted that the remaining six factors either do or do not apply, but did not offer or suggest any reasons how or why. Of the six remaining factors, the Court finds that several are applicable to the circumstances of these three cases.

2) The novelty and difficulty of the questions:

These cases were filed in January, 2006, about three months after the broad, sweeping changes of BAPCPA became effective. This reform legislation introduced all of us – the Court, the Clerk's office, trustees, practitioners and their clients – to a new, more complicated bankruptcy process. The complexity of the decision-making processes concerning the filing of a bankruptcy case increased exponentially, regardless of chapter. Even the simplest of tasks under the old law became novel and difficult questions given the dire consequences that could befall a client (and counsel) for failing to meet any number of these multiple new requirements. Some leeway must be afforded those who take some extra time at this stage to try to get it right and to reassure clients and calm their fear of this Brave New Bankruptcy World. Here, the evidence demonstrates that counsel has proceeded deliberately, yet cautiously, to face this new world.

5) The customary fee:

Because of BAPCPA, this concept is also in flux. We do not have a revised Presumptively Reasonable Fee and probably may not have one for several more months. None of us have enough experience under BAPCPA to know where to set the bar on such a fee. Right now, the Court has more questions than answers in this area. Will unbundling effect practice under BAPCPA? What fee level will provide adequate compensation for competent practitioners, but not provide a windfall to those who might try to cut corners or who cannot measure up to their new professional duties and responsibilities in representing debtors under the new system? Again, providing some leeway is appropriate for counsel, such as the one here, currently attempting to establish workable, office organizational systems and procedures to fulfill the new requirements at a reasonable cost and a manageable level of professional risk.

7) Time limitations imposed by the client or circumstances:

Two of the three cases here were described as emergency or expedited filings because of pending foreclosures. Such cases obviously require counsel to more quickly and deliberately organize the case for filing. In addition, BAPCPA has imposed new requirements that must be completed before the filing and has increased the amount of required information and advice that counsel must provide to the client. The post-filing requirements also add new time constraints within which to file documents, complete deadlines, and confirm a plan, or risk stay relief or dismissal. Accordingly, this factor weights in favor of counsel's fee requests.

8) The amount involved and the results obtained:

This *Johnson* factor is always a necessary consideration for setting a reasonable fee. As compared to Chapter 7 and 11 cases, the fees in Chapter 13 cases often appear quite modest. Under BAPCPA, that appears to be changing. The tasks performed may seemingly appear

uncomplicated or undemanding. However, such views do not mirror the reality of practice and cannot be used as an excuse to criticize or depreciate the value and nature of the services performed or the results achieved. Here, in all three cases, a plan was confirmed within three months of case filing. This is a result that BAPCPA sought to achieve. Favorable consideration of the fee requests is merited by such results.

9) The experience, reputation and ability of the attorneys:

The Trustee did not specifically raise this issue, and no objections to the hourly rates charged for the attorneys or the paralegals were presented. In fact, the Court does not doubt that the Trustee would agree with the Court's assessment that Debtors' counsel in these three cases gets high marks for all three components of this factor.

12) Awards in similar cases:

These are the first contested fee applications the Court has considered. So, it does not have much to compare with these fee requests. However, the Court has reviewed several uncontested fee applications submitted for BAPCPA cases. Anecdotally, the Court recalls allowing fees in Chapter 13 BAPCPA cases of $1,800 on the low end and in excess of $5,000 on the high. The Court found nothing unusual in approving such fees in those cases and was comfortable in assuming that the Trustee had not objected because her office had found no need to object, based on its own analysis of the fee standards as applied to those cases.

In closing argument, the Trustee asserted that her remaining objections to the fees charged in these cases were based on Factors 1) and 3), involving: 1) whether it took an excessive amount of time to perform certain tasks; 2) whether there were inadequate descriptions of certain tasks preventing parties-in-interest from understanding what was done in said tasks; and 3) whether clerical work was being billed at attorney or paralegal rates.

Debtors' counsel responded that 1) the time expended was not excessive under the circumstances; 2) the descriptions were adequate to the extent that concerns for client confidentiality prevented more detailed entries; and 3) that the purported clerical tasks performed by paralegals or the attorney were integral to the professional services provided to the client and are not entirely clerical in nature, if at all.

At the conclusion of the hearings, the Trustee consented to a fee allowance of $2,750 and 100% of requested expenses in each case. This amount represents the lower range of the Presumptively Reasonable Fee or "no look" fee level which has been recommended to the five judges by the Colorado Bar Association's *ad hoc* Chapter 13 fee committee. The allowance of any balance of fees sought in these cases remains for the Court.

The Trustee submits that in each case, the objectionable items do not total a large dollar amount and may not merit the time and effort of the parties and the Court. However, the Trustee argues that such inappropriate charges over the entire number of confirmed Chapter 13 cases create recurring, nagging problems that the Trustee believes should be addressed. The Court will consider these concerns prior to setting fees for the individual cases.

1. Time Spent

a. Excessive Time

The reasonableness of the amount of time spent on various tasks must be determined in light of the nature of the case. *See In re Taylor*, 100 B.R. 42, 45 (Bankr.D.Colo. 1989). For example, a complex Chapter 13 case with many hearings and/or adversary proceedings would take more of an attorney's time than a routine case with few issues. *See Id*. Some of the factors courts have cited when finding that excessive time was billed was that the time was duplicative or unnecessary. *In re Bonds Lucky Foods, Inc.*, 76 B.R. 664, 667 (Bankr. E.D. Ark. 1986). The Court in *Johnson v. Georgia Highway Express, Inc*., pointed out that "the trial judge should weigh the hours claimed against his own knowledge, experience and expertise of the time required to complete similar activities." 488 F.2d at 717.

In general, the Court does not find that Debtors' counsel or its staff spent an unreasonable amount of time in performing services for their respective clients. Nor does the Court find excessive amounts of duplication of work between attorneys and paralegals. Although in hindsight, these cases may not be all that complex, they are some of the first ones filed and confirmed under BAPCPA. Emergency filing issues were present to some extent. The evidence before the Court clearly suggests that the attorneys and paralegals made extra effort to prepare and prosecute the cases correctly, given the uncertainty surrounding the implementation of the new law and the lack of any practical experience on how flexibly or rigidly the performance standards would be set.

For the period of time and circumstances here, the Court cannot find the time expended to provide services was excessive. This does not mean that such amounts of time may not be considered excessive in the future. The Court would expect that as counsel and its staff become more familiar with the BAPCPA requirements, with completing the new forms and documents, and with the practical realities from the experience of representing clients, the time spent and fees charged for some or all services may decline.

b. Clerical Work

Also regarding the issues of time spent, the Trustee asserts that attorneys and paralegals have impermissibly billed for clerical work in certain time entries.

Generally, courts have found that clerical work, performed by a paralegal or attorney, is not billable time to the client. See *In re Taylor*, 100 B.R. at 45 (Bankr. D.Colo. 1989); see also *In re Casull*, 139 B.R. 525 (Bankr. D.Colo. 1992). In In re *Casull*, a paralegal worked on documents for quick filing in a Chapter 13 case, which took 6.4 hours. *Id*. Counsel explained that it took so long because the information had to be assembled and typed into the computer. *Id*. The Court determined that the typing of the information into the computer was a "purely clerical function" and could not be billed to the client. *Id*. In *In re Taylor*, the Court found that "ministerial services such as xeroxing and filing documents with the Court should not be compensated at the same rate as those services which are legal." 100 B.R. at 45. "Even if an attorney or paralegal performs the ministerial services, it does not increase the value of that

service." *Id*. Therefore, the Court found that paralegal time spent on such services was excessive. *Id.*

Clerical work is generally considered an integral part of a law office, but must be considered part of the cost of office overhead. Some Courts have recognized, however, that "some work that may appear to be clerical may not necessarily be so," but "without an explanation of why the services were delegated to a highly paid paralegal . . . the court must require the applicant to carry its burden of proof." *In re Lady Baltimore Foods, Inc.*, 2004 WL 2192368 (Bkrtcy.D.Ks.), citing *Bennett Funding Group, Inc.*, 213 B.R. 234 (Bankr. N.D.N.Y., 1997). The Court will address this issue of clerical work below with respect to the individual fee applications and specific objections.

c. Delegation of Duties

Similar to her objections regarding clerical work, the Trustee raises some concerns that paralegals are billing for certain tasks that may encompass work that is normally performed by an attorney giving instructions to a clerical employee to do for no charge. Such tasks include completion of form letters, calendaring dates and deadlines, and revising documents. Debtors' counsel responds that their office paralegals are hired and trained to exercise independent judgment in a number of areas to support counsel's representation of clients.

Ingersoll recognizes that there are different law office organizational models. Some counsel prefer to practice as sole-practitioners and perform most tasks on their own. Others may use a secretary or part-time contract labor. Still others find the use of paralegals a more efficient, effective approach. The attorney's view of the market plays a large part in determining that structure. It is not the Court's or the Trustee's role to dictate any preferred structure.

As a general proposition, the Court believes it is a reasonable practice model for counsel to employ paralegals to perform legal and office services, even to the exclusion of solely clerical assistance. Again, the focus for the Court is more on the reasonableness of the fees requested, not the practice structure under which they were performed.

The Court has found the Third Circuit's opinion in *In re Busy Beaver Building Centers, Inc.*, 19 F.3d 833, (3rd Cir. 1994) quite helpful in pointing out the benefits and market economies that may result from the proper delegation of authority and duties by attorneys to paralegals. It agrees with the panel's following sentiments:

> "A bankruptcy judge, typically far removed from the economies of law practice and the exigencies of making recurring business judgments about the most prudent and cost-effective method of performing a given task with adequate assurances of quality in a developing, competitive legal market, is generally not well-equipped to review subjectively the law firm's allocation of responsibilities and billing practices."

Here, Debtors' counsel has satisfied the Court that the firm has carefully and methodically analyzed how it uses its paralegal employees, the types of tasks it asks them to perform, the tasks for which it bills clients, and the tasks for which it does not.

The Court's review of the three fee applications shows that each case involved total hours billed of 25 to 28 hours. Of that, attorney time ranged from about 7.5 to 9.2 hours, while paralegal time ranged from about 16 to 20 hours. In the Court's experience, such a division of labor or a blending of responsibilities demonstrates that counsel is utilizing its paraprofessional staff to reduce the amount of time that counsel may be required to spend performing services on the cases.

The Court notes that the current proposal for setting a Presumptively Reasonable Fee under BAPCPA is based on an estimate of 9 hours of attorney time and 10 hours of paralegal time. Clearly, the novelty and difficulty of dealing with BAPCPA's requirements has exceeded that estimate here, at least as to paralegal time. However, counsel has shown to the Court's satisfaction that the extra time involved was reasonable under the circumstances. The Court would expect the learning curve will eventually peak and trend flat or downward.

2. Descriptions in Fee Applications

The Trustee has also questioned the adequacy of some of the fee descriptions.

In order for the fee applicant to meet the burden of proof in a § 330 issue, "the entries on the billing statements must contain adequate detail and analysis of each task so that a Court can discern the nature and value of the services." *In re Colorado-UTE Electric Assoc., Inc.*, 132 B.R. 174, 177 (Bankr. D.Colo. 1991). "It is the obligation of counsel to provide a fee application with sufficient detail to enable the Court to properly allocate and analyze the fees." *Id* at 178. In the case of conferences or discussions, the entries should indicate the topic of conversation and the participants. *Id.*

Here, as to the sufficiency of certain time entries, the hearing must have satisfied the Trustee's initial objections in this area since none were raised in final argument. The Court did find the testimony of Debtors' counsel helpful in providing more detail and explanation on the services performed as well as the need for them under the circumstances.

However, the Court hopes that hearings will not be necessary in all cases for the Trustee, other parties-in-interest or the Court to obtain this information. Without question, more specific, more detailed time entries will assist reviewing parties by providing more information, and thereby reducing the number of questions/objections they may have. Finally, it seems to make sense that if counsel has the burden of proof in supporting a fee application, self-preservation interests should provide enough incentive to be more detailed in fee descriptions.

a. "Lumping" of Tasks

Lumping of tasks is another common area where courts have found the descriptions in fee applications wanting. "Counsel for a party claiming the fees has the burden of proving hours to [the court] by submitting meticulous, contemporaneous time records that reveal, for each lawyer for whom fees are sought, all hours for which compensation is requested and how those hours were allotted to specific tasks." *In re Recycling Industries*, 243 BR. 396, 406 (Bankr. D.Colo. 2000). "['Lumping' is a] practice universally disapproved by the bankruptcy courts. . ." *Id*. Courts may either deny in full the requested compensation in fee applications or reduce the lumped entries to a more moderate time to lumped entries. *Id* at 407. Lumped entries may make it impossible for a court to determine which services are compensable and which are not.

The Trustee did not object to entries on the basis of lumping, but the Court did note some instances where lumping occurred. Fortunately, the limited number of them and some of the testimony has satisfied the Court that a deduction for the lumping of task descriptions in these cases is not necessary. However, for future reference, all counsel and paralegals should be aware that lumping is problematic, and not acceptable. Specific tasks or services should be listed individually with the time spent on that task noted. If several tasks are done at a given time or over the course of a day, the time expended on each task listed in a paragraph of such multiple tasks may be indicated by a parenthetical entry following each separate task.

b. Confidentiality of Fee Application Descriptions

The area of most concern to Debtors' counsel regarding the fee descriptions involved alleged confidentiality issues. Here, Debtors' counsel argued that concerns over revealing client confidences in the fee application prevents more detailed task descriptions. However, it has long been recognized that "[F]ees paid for legal work and the general nature of legal work performed do not constitute a confidential communication and are, therefore, outside the attorney-client privilege." *Turner v. Davis, Gillenwater & Lynch*, 30 B.R. 883, 885 (Bankr. D. Colo. 1983). Generally, fees are not privileged and the payment of such fees is not a matter of confidence, therefore the attorney-client privilege does not apply. *United States v. Hodgson*, 492 B.R. 1175, 1177 (10th Cir. 1974). However, some courts have acknowledged that fee applications may disclose litigation strategies or client confidentiality. *See In re CF & I Fabricators of Utah, Inc.*, 131, B.R. 474, 487 (Bankr. D.Utah 1991). In such cases, which usually involve long-pending, often litigious Chapter 11 cases, courts have allowed redactions of portions of fee applications, but only if applicants do not eliminate "portions that should reasonably appear on the public applications." *Id.* "Professionals should weigh the necessity for confidentiality against the mandate to fully disclose to all parties the basis for the fees requested." *Id.*

The Court does not believe that most routine Chapter 13 cases demand or require such confidentiality concerns. First, if counsel is concerned that the fee application may reveal the client's inability to perform timely or to understand fully their chapter 13 duties, these are not novel issues about which courts are unaware. *Ingersoll* and other cases have recognized the difficulties often faced by counsel in getting certain financially unsophisticated individuals to focus on the duties and responsibilities that arise upon seeking bankruptcy relief. The fact that it may take multiple conferences to explain such matters or take several attempts to get

information and to amend documents accordingly, are all difficulties to be expected. Counsel should not bear the brunt of instances where extra time may be necessary to get accurate facts. However, the Court, the Trustee and other reviewers will not be able to appreciate such difficulties if the fee application does not provide adequate descriptions.

Also, the Court notes that by the time fees are sought in chapter 13 cases, the plan has been confirmed and is binding on all parties-in-interest. The need for confidentiality has lessened. Therefore, the confidentiality concerns posed by counsel generally do not outweigh the need for more detailed task entries to support fee applications. Finally, the confidentiality concerns raised here were only by general references; no specific situations were provided to the Court that might illustrate how more detailed time entries would cause some immediate or irreparable damage to privileged matters.

The Court now turns its attention to these issues in light of the specific fee applications and objections.

In re Brown:

Debtor's counsel requests fees of $3,508.25, after a $190 voluntary reduction, and expenses of $31.92 for total compensation of $3,540.17.

The Trustee asserts that her remaining fee objections total $503.00. The Trustee objects to the reasonableness of the time spent (Jan. 26, 7.0 hours) on the initial case input and filing preparation activities for this matter, given that the case does not appear to have been that complicated. The Trustee recommends that 3.5 hours is more reasonable for the time required to do these tasks, resulting in a fee reduction of $297.50. Here also, the Trustee disputes billing entries for the completion of form instruction letters (Feb. 13, Apr. 4, Apr. 27) and transmittal letters (Feb.13, Apr. 5) to the client ($63.00); the calendaring of the 341 meeting (Feb. 13, $28.50); the efiling of documents (Apr. 14, $19.00); and the billing for other possible clerical tasks.

Finally, the Trustee objects to 0.4 hours of an attorney's billing entry totaling 1.8 hours spent scanning or entering pay stubs (Jan. 27). The Trustee asserts that this work could have been performed by a paralegal, resulting in a reduction of $105.

Regarding the excessive time objection, the fee application and the evidence show that counsel has already voluntarily reduced the 7.0 hours to 5.0 hours on the final billing. This demonstrates to the Court that counsel has recognized possible concerns in advance and exercised her billing judgment as to this matter. The Trustee provided no independent evidence and did not elicit any testimony in cross-examining counsel to impeach or otherwise refute counsel's billing judgment.

From the record, the Court cannot say whether 5.0 hours or 3.5 hours is the more reasonable time for perform these tasks. The Court does note that the time entry does lump a number of services together, but the Trustee did not raise that issue.

The Court will not second-guess the counsel's billing judgment on this issue. These cases were filed in January 2006, a relatively short time after BAPCPA became effective. That is the context in which the Court must consider the reasonableness of the time spent in performing legal services for the client. As mentioned, BAPCPA has created a brave new bankruptcy world. Here, evidence demonstrated that counsel has spent considerable time 1) developing new office procedures to meet the many additional duties and requirements placed on consumer debtors' attorneys; 2) reviewing staffing needs and training that staff to perform satisfactorily in meeting the new demands; and 3) creating forms, instruction letters, manuals and other materials to assist both the attorneys and staff in the service of clients. The fact that counsel or staff might spend more time performing some or all services under BAPCPA than under the old law is quite understandable and reasonable under the circumstances at this point in time.

Regarding what the Trustee refers to as form instruction or transmittal letters, copies of these documents were not part of the evidence. Reviewing these documents would be helpful to the Court, especially in being able to see for itself whether they are in fact simple forms, requiring a few blanks to be filled in with little or no independent or professional judgment required to complete them. Counsel's testimony stated that many of these forms were developed by the attorneys and office paralegals to meet the new BAPCPA requirements. The process took several weeks and numerous drafts as they continued to study, absorb and better understand what BAPCPA demanded of them and their clients. The forms and the office manuals providing procedures on how to use them are attorney work product. The attorneys have delegated to paralegals the job of knowing when to use a particular form and of where to obtain the information from various office and court records to fill in the blanks. Based on the record, such tasks appear to be more than simple clerical tasks and require some level of discretion and professional judgment that is properly billed by a paralegal. The Court believes this to be a proper delegation of authority based on the record before it. To avoid possibly penalizing counsel for using good organizational skills, no deduction will be made as to this issue.

Regarding the charges for the calendaring of the 341 meeting, the efiling of documents and the billing for other possible clerical tasks, the Court recognizes that standing alone, such charges may appear excessive and not billable as clerical tasks. However, viewing these charges in the context of the entire fee application, such charges are *de minimus* and reasonable in light of the total amount of compensation sought and the Court's prior analysis of the other *Johnson* factors.

At this stage, the Court wonders whether under BAPCPA, the nature of certain tasks that previously were characterized as clerical may no longer be so. Previously, most might consider the entry of 341 meetings, court hearings and statutory deadlines to be clerical tasks. However, with BAPCPA, the failure to comply with certain deadlines may be fatal to the client's case. Failure to accurately record deadlines and timely perform may result in dismissal, expiration or termination of the stay or removal of property from the estate, all automatically by the mere lapse of time. Here, counsel testified that malpractice insurance carriers are more adamant in their demands that deadlines be tracked and tracked using multiple backup systems. Whether the entry of deadlines is purely clerical or not, the Court is not prepared to say at this juncture. On the record before it, the entries for such tasks are not excessive and their allowance does not

make the fee requested unreasonable in light of the Court's overall analysis of the *Johnson* factors. The same analysis holds true for the "entries of appearance" objection. Given the serious ramifications that might flow from the improper handling of appearances and creditors' addresses, under 11 U.S.C. § 342, Rules 9014 and 7004, this single entry does not offend the Court.

Likewise, the Court does not consider the fact that an attorney efiles a document means that it is a clerical task and must not be billed. The modern reality concerning the business of the legal profession – some of us dinosaurs would say the curse – is that computers, email, scanners, cell phones, Blackberries have become an integral part of the successful, efficient delivery of legal services. Procedures and operations are driven and dictated by the technological, time-saving wonders at our disposal. This is true for the Court and Clerk's Office operations; the U.S. Trustee's Office; the Chapter 13 Trustee's Office; and debtors' counsel. The historical model of an attorney drafting a pleading and giving it to a secretary to type may be passe′. Today, attorneys and paralegals, judges and clerks use computers and software to draft pleadings and type while doing so. They think, organize and compose, but also engage in the clerical function of typing to generate a work product. How professionals are able to break out such integrated tasks is presently a mystery to the Court.

In addition, the Bankruptcy Court and Clerk's Office over the past few years have essentially conscripted attorneys and their staffs to be docketing clerks for the Bankruptcy system. They are trained for the position and the attorney's CM/ECF registration number is now the authority to file documents and how they are tracked and policed. Therefore, the Court does not find it surprising or unusual that certain entries may reflect that an attorney may have billed a task as efiling. As long as the task is the culmination of a professional service, such as drafting or revising a pleading or other document for filing; or, such tasks are not excessive in number when compared to the total amount of services rendered for the case, the Court does not believe the occasional or isolated billing for such services to be unreasonable in light of the *Johnson* factors so as to require a fee reduction.

Finally, the Trustee objects to an attorney billing for scanning pay stubs for electronic filing. As with typing and efiling, the Court cannot say with certainty that this is a purely clerical task given the circumstances and the time period when this case was filed. Apparently, this task was performed by the attorney after office hours to complete services necessary to meet a filing deadline. It is explained that the pay stubs and other scanned documents needed to be reviewed and culled to be sure that the correct pay stubs and required documents were properly included for scanning. This connotes the performance of a legal service in conjunction with clerical work necessary to complete the task. Again, the blending of such activities is difficult to separate with precision if they are being performed at the same time.

The Trustee also asserts that this task and the others comprising this 1.8 hour time entry could have been performed by a paralegal. Maybe so, if one was around after normal office hours or could probably be done the next day. But, the Court notes that the time entry also shows that a B-22 form was reviewed as well. This appears to be a task that is one for an attorney, especially at this early stage of filing cases under BAPCPA. The fact that a few

different tasks have been lumped under this entry was not raised as an objection. The Court does not believe that the billing of this time requires a deduction.

In re McNally:

Debtor's counsel requests a total fee of $3,525.75, and expenses of $185.36. The Trustee objects to billings that total $304.00.

The Trustee asserts that Debtor's counsel has billed the client $133 for clerical tasks such as scanning documents (Jan. 12, $47.50); calendaring dates (Jan. 16, $38.00); processing a creditor's entry of appearance (Jan. 16, $9.50); and billing for two form letters that provide instructions to clients (Jan. 20, Apr. 27, $38.00). The balance of the Trustee's objectionable charges relate to the correcting, revising or editing of documents following the attorney's conferences with the client or an office paralegal whether such changes are made by an attorney or a paralegal.

The Court's consideration of all the *Johnson* factors in this and the other cases leaves it with the view that under the circumstances and timing of this case, no deduction of the fees to which the Trustee objects as being clerical is appropriate for reasons previously discussed. The evidence suggests that these descriptions which pertain to the inputting of data also include elements of analysis and the exercise of discretion. For example, the scanning of pay stubs and documents by a paralegal will often involve culling through the stack of client documents and making judgments on what to use, how it is to be used, and what information is pertinent, while also scanning or inputting it as part of an integrated process. The financial demands of a modern legal practice virtually force such efficiencies be utilized. The Court sees nothing in the evidence to convince it that having an attorney review the documents, give instructions to a clerical person, and then check the work following that input, saves time, effort or money in the final analysis. The attorney's billing rate is much higher than the paralegals and so the use of trained paraprofessional assistance is a reasonable approach.

The balance of objectionable fee charges for correcting and revising documents following conferences or meetings with clients appears reasonable to the Court in light of general legal practice. Bankruptcy cases are dynamic and fluid. Situations change, crises arise, and information ebbs and flows as it is obtained from other parties in the case or on a continuing basis from the client. Pleadings and documents must be revised and updated. Sometimes, changes are done proactively to prevent a problem; sometimes reactively to try and correct one. The work must be done. As long as the client is not unreasonably double-billed for an interoffice conference to explain the problem or the client is not billed for correcting a problem resulting from the attorney's mistake or delay, such charges appear reasonable to the Court. No deduction is appropriate here.

In re McGlothlin:

Debtor's counsel requests fees of $3,609.00 and expenses of $70.22 for total compensation of $3679.22.

The Trustee objects to billings totaling $256.50. These charges again include another $133.00 of time spent on scanning documents (Jan. 16, $47.50); calendaring deadlines (Jan.16, $38.00); processing an entry of appearance (Feb. 8, $9.50); and, billing for instructional form letters to the client (Jan. 20, Apr. 27, $38.00). The remaining balance again involves the correction and revision of documents after a review of documents by an attorney or conferences by an attorney with the client or a paralegal.

The Court makes no deduction for the objections to the bills involving possible clerical work. As with Brown and McNally, the evidence convinces the Court that there is a sufficient and necessary blending of professional or paraprofessional judgment integrated with tasks that may also have some clerical nature to support the reasonableness of such billings. The time for corrections and revising in this case amounts to $123.50. This amount, and that in McNally, standing alone, in the Court's view would seem somewhat high for such tasks. However, these cases involved emergency filings and occurred in January, when not many cases under BAPCPA had been filed. Filing an emergency case under BAPCPA is a risky proposition, especially one done at a time when everyone lacked experience in practicing under the new requirements. Plus, by their nature, emergency or rapid filings often require that pleadings and documents be filed; and those that had to be filed to meet deadlines must be amended as more information comes to light. The combination of these factors – novelty and emergency – leads the Court to conclude that the billings for corrections and revisions are reasonable under the circumstances.

Accordingly, the Court, already having approved the requested expenses in the three cases, and assuming its math is correct, will allow fees in these cases as follows:

Brown	$ 3,508.25	less $ 2,750 already approved is	$ 758.25 additional
McNally	$ 3,525.75	less $ 2,750 already approved is	$ 775.75 additional
McGlothlin	$ 3,609.00	less $ 2,750 already approved is	$ 859.00 additional

Within ten (10) days, Counsel shall submit forms of order for each case showing total amount requested, amount allowed as of the July 13, 2006 hearing, and the balance due allowed.

CONCLUSION

Now briefly, as to the parties' hope for some guidance. The Court cannot provide much. It is too early for this Court to discern many overarching conclusions regarding a Presumptively Reasonable Fee level and related procedures at this time. The Bar, or at least certain members of it, has and continues to provide the Court with its views on a proposed fee level for the consideration of the five judges.

Because of the demands of BAPCPA, the costs of filing Chapter 13 cases have risen. But, the exigencies of consumer practice still exist and maybe they have increased permanently with new requirements like credit counseling, obtaining tax returns, all the new Debt Relief Agency requirements, and many other checks and balances imposed by BAPCPA.

The new requirements may especially be a problem for counsel, as in two of the cases here, where debtors still procrastinate, waiting until the last moment to seek the assistance of counsel. Congress may have hoped to address such problems in BAPCPA, but often, human nature may not be readily amenable to change through legislation.

Clients now have more questions about more requirements. Time frames to perform have been tightened by statute and rule. It is often tough to write a time entry down before having to move on to another phone call, another client, another emergency, another fire to put out. But that is a fact of life in the profession and it exists to a greater or lesser extent in all areas of debtor practice.

The fees here are about $3,500. That level is considered reasonable by the Court here based upon the facts and circumstances of these cases. The Court cannot say if $3,500 is a reasonable figure for a Presumptively Reasonable Fee. As time goes on, time to perform services may decrease and so may the general level of fees. While this decrease might be offset by increased creditor activity, certain aspects will remain the same.

We know that the requirements of § 330 and existing case law on fees still exist. Fees are to be determined under the same standards. Colorado is a district that historically has had no shortage of fee opinions from which parties can pick and choose in support of fees, or more likely, for objection to them. And, the Presumptively Reasonable Fee is just that, a presumption. Presumptions are rebuttable, so counsel must be prepared to meet objections to fees. That is why the term "no look" fee is somewhat of a misnomer.

In addition, the use of the Presumptively Reasonable Fee process suggests for this Court that the "unbundling" of legal services may have limited or no application in the Chapter 13 context. Under the streamlined fee process, debtors' attorneys are agreeing to perform those tasks appearing in the rule's list of "basic, anticipated services" as the *quid pro quo* for having fees allowed on a more expedited basis. If attorneys are allowed to exclude any of these services as part of their engagement, the Court questions whether counsel may use the Presumptively Reasonable Fee process. Obviously, if counsel performs those services and the fees for doing so exceed the Presumptively Reasonable Fee level, then that attorney can request a larger fee and use full, normal notice and hearing procedures to do so. Likewise, if counsel seeks to limit or omit some of the tasks on that essential services list, then that counsel may not fall within the Presumptively Reasonable Fee process and would have to seek fee allowance under full notice and hearing procedures as well. A more crucial issue for this Court is in finding an approach that permits fee requests for necessary post-confirmation services to be considered and allowed by a streamlined process as well.

1) On the attorney's part, the fee application process first requires some adequate measure of time-keeping and the ability to explain what was done and accomplished in the case. Generally, this is done by keeping, as best one can, contemporaneous time records. It is counsel's burden to bear.

a) Keeping time records is a sound practice even in a flat fee engagement, if for no other reason than to know whether counsel is making money by taking engagements at that flat

rate. But the records also provide valuable support for the fee request should someone decide to object after all of the work has been done.

b) Those time records should take care not to lump several tasks under a single time entry. Client confidentiality concerns should not pose a barrier to providing detailed time entries that help the reviewer to know what was done, by whom, with whom, what it accomplished and how long it took.

Nor should this ruling and these remarks be viewed by counsel as an invitation to increase the number of billings for tasks that can reasonably be viewed as clerical work. Nor should one think that an unlimited number of corrections and revisions is always allowed. How a law office is organized and how duties are delegated to categories of personnel will have a bearing on this issue. How those personnel perform their duties and tasks will as well. However, it is the professional's job in setting the final fee to be charged for the engagement to consider these issues and make appropriate adjustments, if necessary, to comply with the billing standards of *Johnson* and its progeny.

c) Attorneys should demonstrate they used billing judgment in deciding the amount to request for fees and expenses. The exercise of billing judgment is the need for an attorney, in hindsight, to perform an honest assessment of the case in preparing a fee application. What results were achieved? What difficulties encountered? What tasks were done well and what were not? Which tasks took too long and are there legitimate reasons why? Would a more detailed description be helpful? A big pain, the Court recognizes, but it is another fact of modern legal and business reality, especially after *In re Ingersoll*.

It involves some soul searching. It involves a realistic assessment of one's performance. It is an opportunity, if necessary, to clarify and supplement the time written down or left out in the heat of practice, in the stress and restrictions of solving problems for clients. A brief narrative can go a long way toward saving overall time and effort by giving the Court and reviewers the information that avoids the need to object. The use of such billing judgment narrative also appears reasonably justified by the fact that the general level of fees has substantially increased under BAPCPA.

This doesn't mean that the Court expects attorneys to lower their fees in every case, nor should they. It is left to the professional's judgment and intimate knowledge of the case, to determine where a write-off is appropriate for certain matters under the applicable standards. If none are necessary based on that internal analysis, the attorney should be willing to say so by a brief statement in the fee application.

2) On the fee reviewer's part, the *Ingersoll* case shows how vital the input of the Chapter 13 Trustee can be in sustaining a Presumptively Reasonable Fee process. Let's face it, the Trustee's job is often a thankless one when it comes to fee objections. Her decisions are always subject to second-guessing by the Court and the Bar. But remember, debtors' counsel's fee applications are also subject to second-guessing by the Court and the Trustee. On one hand, debtor's counsel has the responsibility to submit an adequate, sufficiently detailed fee application to anticipate possible questions or concerns of the reviewer. On the other hand, the

Trustee has the responsibility of reviewing fees and making difficult decisions on what fee requests are objectionable. This review is all-encompassing and is more difficult for both sides if sufficient detail is missing from the fee application.

Practically, how can this process be done so the attorney can get paid and so others who are required to review the fee application, can do their job, too? In this District, we have determined the Presumptively Reasonable Fee structure is a more efficient and effective procedure than examining the intricacies of every case. Our current process has worked well, but will need tweaking, both as a result of BAPCPA and possibly some based on our collective experience of working under it for a few years. These things are still a work-in-process.

DATED this 10th day of August, 2006

BY THE COURT:

/s/ HRT

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Howard R. Tallman, Judge
United States Bankruptcy Court